

1 THE HONORABLE JOHN C. COUGHENOUR  
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7 UNITED STATES DISTRICT COURT  
8 WESTERN DISTRICT OF WASHINGTON  
9 AT SEATTLE

10 MARTA MILLER,

11 Plaintiff,

v.

12 BOYS & GIRLS CLUBS OF  
13 SNOHOMISH COUNTY,

14 Defendant.

CASE NO. C15-2027-JCC

ORDER

15 This matter comes before the Court on Defendant Boys & Girls Club of Snohomish  
16 County's motion for summary judgment (Dkt. No. 22) and the parties' stipulated motion to seal  
17 documents attached to Defendant's motion for an independent medical exam (Dkt. No. 33).  
18 Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral  
19 argument unnecessary and hereby GRANTS in part and DENIES in part the motion for summary  
20 judgment and GRANTS the motion to seal for the reasons explained herein.  
21

**I. BACKGROUND**

**A. Employment History**

22 Plaintiff Marta Miller, an African American woman, began working at Defendant's  
23 Monroe club in 2011 as a youth leader. (Dkt. No. 1 at ¶ 1.1; Dkt. No. 23 at 6.) In September  
24 2011, the Unit Director of the Monroe Boys & Girls Club (BGC), Mike Wetmore promoted her  
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1 to Program Director. (Dkt. No. 23 at 6; Dkt. No. 28-2 at 2.) In November 2011, Mr. Wetmore  
 2 completed Plaintiff's performance evaluation and gave her scores in the range of 3 to 5  
 3 (satisfactory to excellent, respectfully). (Dkt. No. 28-4 at 3–4.) Mr. Wetmore praised her hard  
 4 work and effort but also included specific areas for improvement, including that Plaintiff needed  
 5 "to make sure her work space and the club's appearance [were] always a priority." (*Id.* at 3.)

6       **B.     2013 Incident with Mr. Wetmore**

7       On May 21, 2013, Mr. Wetmore returned to the Monroe BGC and noticed that "there was  
 8 garbage all over in front of" the club that had been left by teenagers who had been at the BGC.  
 9 (Dkt. No. 23 at 122.) Mr. Wetmore went inside to the front office and instructed Plaintiff to go  
 10 outside and pick up the trash. (*Id.* at 9, 122.) A white, male employee, Sam Faidley, was also on  
 11 duty that day. (Dkt. No. 28-6 at 6; Dkt. No. 29 at ¶ 4.) Plaintiff responded that the teens should  
 12 clean up the trash and refused to do it herself. (Dkt. No. 23 at 9.) Then, Mr. Wetmore put "two  
 13 hands on [Plaintiff's] shoulders and turned her toward the door" to go clean up the trash. (*Id.*  
 14 at 122.) At her deposition, Plaintiff testified that Mr. Wetmore "walked towards [her] in a  
 15 threatening manner and scared [her] and grabbed [her] on [her] right shoulder with his hand and  
 16 tried to pull [her] out of the office in front of the kids." (*Id.* at 9.) Mr. Wetmore acknowledged  
 17 that it was inappropriate for him to touch Plaintiff in that way. (Dkt. No. 28-6 at 14–15.) Mr.  
 18 Wetmore testified that "it was frustrating because [trash in front of the BGC] had been  
 19 happening over and over again for several days" and he had told Plaintiff to address the issue  
 20 multiple times before. (Dkt. No. 23 at 122.)

21       Plaintiff believes that Mr. Wetmore's actions were motivated by her race. (*Id.* at 9.)  
 22 However, Plaintiff admitted that Mr. Wetmore never did or said anything to refer to her race. (*Id.*  
 23 at 9–10.) Plaintiff also admitted that she has no knowledge of Mr. Wetmore ever saying or doing  
 24 anything of a racist nature.<sup>1</sup> (*Id.* at 10.)

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25       <sup>1</sup> Defendant also states in its briefing that Plaintiff "admitted during her deposition that she has no knowledge of  
 26 anyone at the BGC (including Mr. Wetmore) ever saying or doing anything of a racist nature." (Dkt. No. 22 at 5.)  
 However, the pages of the deposition Defendant cites were not provided to the Court.

1       The next day, the Regional Director, Marci Volmer; the HR Director, George Morrison;  
 2 and the Area Director, Mike Neumeister, met with Plaintiff and Mr. Wetmore about the incident.  
 3 (*Id.* at 10, 124.) Plaintiff was issued a notice of staff discipline for “insubordination to [a]  
 4 supervisor including inappropriate language, volume, and tone both in front of members and in  
 5 the office.” (Dkt. No. 28-17.) Shortly after that, Plaintiff was transferred to another BGC location  
 6 with the same title and pay. (Dkt. No. 23 at 125; Dkt. No. 28-10 at 13; Dkt. No. 28-21 at 2.) Mr.  
 7 Wetmore testified that he did not recall receiving a notice of discipline and he did not suffer any  
 8 sort of dock in pay or reduction of benefits. (Dkt. No. 28-6 at 18–19.) There is no evidence to the  
 9 contrary.

10       On May 29, 2013, the Snohomish Branch of the National Association for the  
 11 Advancement of Colored People (NAACP) sent a memorandum to Defendant that it intended to  
 12 investigate Plaintiff’s claim that Mr. Wetmore “assaulted her physically and was verbally  
 13 abusive” and that “the treatment she received was racially motivated.” (Dkt. No. 28-22 at 2.)  
 14 Defendant took no action in regards to the letter because it believed the language contained  
 15 within the letter, that the NAACP would contact Defendant in a few days, required no immediate  
 16 action. (Dkt. No. 28-23 at 5.)

17       In June 2013, Ms. Volmer contacted Plaintiff to ask her to return to the Monroe BGC at  
 18 the request of Mr. Wetmore. (Dkt. No. 23 at 11.) Plaintiff accepted the transfer, acknowledged  
 19 that she and Mr. Wetmore would have “weekly/monthly meetings with [Ms. Volmer]”, and  
 20 asked to receive training in management, conflict resolution, and communication. (*Id.* at 91.)  
 21 Plaintiff and Mr. Wetmore also signed a “Moving Forward Action Plan.” (*Id.* at 130.) Upon her  
 22 return to her original position at her original location, management asked her to sign a “Hold  
 23 Harmless Agreement” to release all her claims against Defendant. (Dkt. No. 28-12 at 14–15.)  
 24 Plaintiff also wrote to the NAACP that “the matter . . . [had] been resolved.” (Dkt. No. 23 at 93.)

25       **C. 2013 Unit Director Position**

26       In September 2013, Mr. Wetmore requested a transfer to the Lake Stevens club. (*Id.*

1 at 126.) This created an opening at the Monroe club for the Unit Director position. Plaintiff  
 2 emailed Ms. Volmer about her interest in the job. (Dkt. No. 28-26 at 2.) Ms. Volmer stated at her  
 3 deposition that she cannot remember if Plaintiff applied for the 2013 opening and does not recall  
 4 encouraging Plaintiff to apply or discouraging Plaintiff from applying. (Dkt. No. 28-7 at 13–15.)  
 5 However, Plaintiff claims in her declaration that after she sent the email, Ms. Volmer “called  
 6 [her] to inform [her] that it was ‘too soon’ after [her] complaint to the NAACP for the Club to  
 7 consider [her] for the Unit Director vacancy.” (Dkt. No. 29 at ¶ 8.)<sup>2</sup> In the end, the Monroe BGC  
 8 hired Angie Schab for the position. (Dkt. No. 28-7 at 67.)

9       In February 2014, Ms. Volmer, due to Ms. Schab’s absence, completed Plaintiff’s  
 10 performance evaluation and gave her scores in the range of 3 to 5. (Dkt. No. 28-5 at 2.) Ms.  
 11 Volmer stated that Plaintiff should continue to work on conflict resolution strategies and learn  
 12 management skills such as budgets, staff mentoring, fundraising, and donor relations. (*Id.* at 3.)

13       In April 2014, Plaintiff was awarded a University of Phoenix Boys and Girls Club of  
 14 America Scholarship.<sup>3</sup> (Dkt. No. 28-9 at 2; Dkt. No. 29 at ¶ 3.) Ms. Schab sent out an email to  
 15 the Monroe BGC club announcing Plaintiff’s scholarship and congratulating Plaintiff on her  
 16 accomplishment. (Dkt. No. 28-9 at 2.)

17           **D. 2014 Unit Director Position**

18       In August 2014, Ms. Schab’s employment at the Monroe BGC ended, and Ms. Volmer  
 19 asked Plaintiff if Plaintiff would take on additional duties as interim Unit Director.<sup>4</sup> (Dkt. No.  
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21       <sup>2</sup> Defendant objects to this portion of Plaintiff’s declaration as hearsay. (Dkt. No. 31 at 2 (citing Fed. R. Civ. P.  
 22 56(c)(4).) However, a statement that is offered against Defendant and made by one of Defendant’s employees, while  
 23 she was employed by Defendant and was authorized to make such statements, is an opposing party statement and a  
 24 hearsay exemption. *See* Fed. R. Evid. 801(d)(2).

25       <sup>3</sup> Defendant also claims that it encouraged Plaintiff to apply for this scholarship and gave her a “glowing reference.”  
 26 (Dkt. No. 22 at 6.) However, the deposition page cited was not provided to the Court.

<sup>4</sup> Defendant also discusses this point in its briefing and also cites the same page of the Volmer Deposition as  
 Plaintiff. (Dkt. No. 22 at 6.) However, again, this page is not included with Defendant’s supporting evidence, but is  
 included with Plaintiff’s, along with an email to the BGC Advisory Committee announcing Plaintiff’s new role.  
 Moreover, Defendant’s briefs are replete with instances of unsupported statements of fact. The Court is grateful for  
 Plaintiff’s complete and all-inclusive evidentiary submission and briefing citations to fill in the gaps.

1 28-7 at 3; Dkt. No. 28-27 at 2-3.) Ms. Volmer encouraged Plaintiff to apply for the permanent  
 2 position, (Dkt. No. 28-7 at 3), and Plaintiff submitted her application on September 5, 2014,  
 3 (Dkt. No. 28-31 at 2). Plaintiff was one of three applicants selected for the final interviews. (Dkt.  
 4 No. 23 at 112.) Another final interviewee was Jeffrey Rasmussen, a member of the Monroe City  
 5 Council with bank management experience. (Dkt. No. 28-35 at 2.) A three-person panel  
 6 consisting of George Morrison, the BGC HR Director; Ms. Volmer; and Mr. Neumeister  
 7 interviewed all three final applicants. (Dkt. No. 28-12 at 20-21.) Plaintiff claims that Mr.  
 8 Morrison asked during her interview if she regretted bringing a complaint to the NAACP. (Dkt.  
 9 No. 28-10 at 17-18.) Mr. Morrison denied asking any questions about the subject but said that  
 10 his feeling, in general, was that issues should be resolved “at the lowest level” possible. (Dkt.  
 11 No. 28-12 at 27-30.). Mr. Neumeister did not remember if that question had been asked, (Dkt.  
 12 No. 28-13 at 5-7), but Ms. Volmer remembered the question, (Dkt. No. 28-7 at 21-24). Plaintiff  
 13 was also asked if she could have handled the incident and confrontation with Mr. Wetmore in a  
 14 different manner.<sup>5</sup> (Dkt. No. 28-10 at 21.) After the interview, Plaintiff told her friend who  
 15 worked at the Monroe BGC that she “blew her interview.” (Dkt. No. 23 at 96.)

16        Ultimately, Defendant decided to hire Mr. Rasmussen as the new Unit Director for the  
 17 Monroe Club. (Dkt. No. 28-28 at 3.) According to Defendant, Mr. Rasmussen was hired due to  
 18 his financial experience because the panel wanted “to bring in someone who would . . . do it  
 19 totally different, look at it with different eyes and kind of start fresh.” (Dkt. No. 28-7 at 19-20.)

20        **E. Plaintiff’s Resignation**

21        On December 2, 2014, Plaintiff, Mr. Rasmussen, and Ms. Volmer had a meeting. (Dkt.  
 22 No. 23 at 119.) After the meeting, Ms. Volmer wrote Plaintiff an email stating that she knew  
 23 Plaintiff was “not happy with the situation, but [Plaintiff’s] very evident attitude towards [Mr.

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24       <sup>5</sup> Defendant alleges that “[d]uring the interview, they discussed the incident with Mike Wetmore and asked  
 25 [Plaintiff] if she could have handled the incident better. She was defensive and refused to acknowledge that she  
 26 could have handled the incident better.” (Dkt. No. 22 at 7.) However, this assertion has no citations to any of the  
 supporting evidence and is not supported by the evidence provided. In fact, Plaintiff refused to acknowledge that she  
 could have handled the incident better at her *deposition*. (Dkt. No. 23 at 13; Dkt. No. 28-10 at 22.)

Rasmussen] was unacceptable.”<sup>6</sup> (*Id.*) Additionally, Mr. Rasmussen noted after a meeting with Plaintiff on February 3, 2015, that she was not properly communicating with him and inappropriately overstepping her boundaries, including asking staff to follow her instructions rather than his. (*Id.* at 143–45.) It is clear from a cover letter dated February 18, 2015, that Plaintiff started applying for other jobs shortly after this meeting. (*Id.* at 97.)

On February 20, 2015, Mr. Rasmussen completed Plaintiff’s annual performance review and gave her mostly 3s (satisfactory) and some 2s (below average). (Dkt. No. 28-38 at 2.) He described her strengths, including positive interactions with children and their parents, and noted that she needed to improve her communication with him and being open to criticism. (*Id.* at 3.) Mr. Rasmussen also included goals for 2015. (*Id.*)

On February 21, 2015, Plaintiff submitted her resignation, stating that her last day would be March 6, 2015. (Dkt. No. 28-39 at 2–3.) On February 25, 2015, Plaintiff was unable to log in to her BGC user account and emailed Ms. Volmer and Mr. Morrison that she was resigning “effective immediately.” (Dkt. No. 23 at 99.)

On December 10, 2015, Plaintiff filed a complaint against Defendant alleging (1) race discrimination in violation of 42 U.S.C. § 1981 and Washington’s Law Against Discrimination (WLAD) and (2) retaliation in violation of § 1981 and WLAD. (Dkt. No. 1 at 3–4.) Defendant now moves for summary judgment on all claims. (Dkt. No. 22.)

## **II. MOTION FOR SUMMARY JUDGMENT**

### **A. Summary Judgment Standard**

“The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R.

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<sup>6</sup> Plaintiff claims that Ms. Volmer spoke with Mr. Rasmussen when he started and warned him to be “leery” of Plaintiff because of her previous issues with Mr. Wetmore. (Dkt. No. 27 at 14) (citing Dkt. No. 28-28 at 5–8, 20). However, the deposition says no such thing. The deposition testimony states just that Ms. Volmer had told Mr. Rasmussen that Plaintiff had applied for the position. (Dkt. No. 28-28 at 7–8.) Mr. Rasmussen said the topic of the Mr. Wetmore incident “came up in conversation”, not that he was warned. (*Id.* at 21.) He also states, unequivocally, that Plaintiff’s filing of a NAACP complaint did *not* make him wary of working with her. (*Id.* at 20.)

1 Civ. P. 56(a). In making such a determination, the Court must view the facts and justifiable  
 2 inferences to be drawn there from in the light most favorable to the nonmoving party. *Anderson*  
 3 *v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Once a motion for summary judgment is  
 4 properly made and supported, the opposing party “must come forward with ‘specific facts  
 5 showing that there is a *genuine issue for trial.*’” *Matsushita Elec. Indus. Co. v. Zenith Radio*  
 6 *Corp.*, 475 U.S. 574, 587 (1986) (quoting Fed. R. Civ. P. 56(e)). Material facts are those that  
 7 may affect the outcome of the case, and a dispute about a material fact is genuine if there is  
 8 sufficient evidence for a reasonable jury to return a verdict for the non-moving party. *Anderson*,  
 9 477 U.S. at 248–49. Conclusory, non-specific statements in affidavits are not sufficient, and  
 10 “missing facts” will not be “presumed.” *Lujan v. National Wildlife Federation*, 497 U.S. 871,  
 11 888–89 (1990). Ultimately, summary judgment is appropriate against a party who “fails to make  
 12 a showing sufficient to establish the existence of an element essential to that party’s case, and on  
 13 which that party will bear the burden of proof at trial.” *Celotex Corp. v. Catrett*, 477 U.S. 317,  
 14 324 (1986).

15           **B. 2013 Unit Director Position**

16           As a preliminary matter, the Court must first address Plaintiff’s claims that she was  
 17 discriminated and retaliated against when Ms. Volmer told her it was “too soon” after her  
 18 NAACP complaint to apply for the 2013 Unit Director position. (Dkt. No. 27 at 20, 26; Dkt. No.  
 19 29 at ¶ 8.) However, Ms. Volmer stated in her deposition that she does not remember saying that  
 20 to Plaintiff and doubts she would have said something like that. (Dkt. No. 28-7 at 13–15.)  
 21 Genuine disputes of fact remain whether this statement actually happened. Summary judgment  
 22 on this issue is, therefore, inappropriate. The Court will not consider this claim in its analysis and  
 23 the motion for summary judgment on the discrimination and retaliation claims in relation to the  
 24 2013 Unit Director position is DENIED.

25           **C. Race Discrimination Claims**

26           Both § 1981 and WLAD protect employees from discrimination on the basis of race. See

1 42 U.S.C. § 1981; Wash. Rev. Code § 49.60.180. When analyzing § 1981 and WLAD claims,  
 2 courts apply the same legal principles as those applicable in a Title VII disparate treatment case.  
 3 *See Metoyer v. Chassman*, 504 F.3d 919, 930 (9th Cir. 2007); *Grimwood v. Univ. of Puget  
 4 Sound, Inc.*, 753 P.2d 517, 520 (Wash. 1988). There are two models applicable to such  
 5 discrimination cases: the *McDonnell Douglas*<sup>7</sup> burden-shifting framework and the “mixed-  
 6 motives” framework established in *Pricewaterhouse v. Hopkins*, 490 U.S. 228 (1989). The  
 7 parties disagree which standard the Court should apply for the discrimination claims. Defendant  
 8 suggests the *McDonnell Douglas* burden shifting analysis, (Dkt. No. 22 at 11–12), while Plaintiff  
 9 offers the mixed-motives approach, (Dkt. No. 27 at 17).

10 As a preliminary matter, “although the *McDonnell Douglas* burden shifting framework is  
 11 a useful tool to assist at the summary judgment stage . . . nothing compels the parties to invoke  
 12 the *McDonnell Douglas* presumption.” *McGinest v. GTE Service Corp.*, 360 F.3d 1103, 1122  
 13 (9th Cir. 2004) (citation and internal quotation marks omitted). Instead, “when responding to a  
 14 summary judgment motion . . . [the plaintiff] may proceed by using the *McDonnell Douglas*  
 15 framework, or alternatively, may simply produce direct or circumstantial evidence demonstrating  
 16 that a discriminatory reason more likely than not motivated [the employer].” *Id.* “*McDonnell  
 17 Douglas* and ‘mixed-motive’ are not two opposing types of cases.” *Costa v. Desert Palace, Inc.*,  
 18 299 F.3d 838, 857 (9th Cir. 2002), *aff’d*, 539 U.S. 90 (2003).

19 Despite the existence of these two avenues of analysis, the “employee’s ultimate burden  
 20 of proof in all cases remains the same: to show by a preponderance of the evidence that the  
 21 challenged employment decision was because of discrimination.” *Id.* Thus, when responding to a  
 22 summary judgment motion, a plaintiff may choose whether to proceed under *McDonnell  
 23 Douglas*, the mixed-motives framework, or both. *Dominguez-Curry v. Nev. Transp. Dep’t*, 424  
 24 F.3d 1027, 1037 (9th Cir. 2005). The Court need only decide whether there is a possibility of  
 25 mixed motives before submitting the case to a jury. *Stegall v. Citadel Broad. Co.*, 350 F.3d 1061,

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26 <sup>7</sup> *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

1 1071 (9th Cir. 2004). Therefore, at this early phase, it is inappropriate for the Court to decide  
 2 which model better fits this case, and the Court accordingly will consider both. *Dominguez-*  
 3 *Curry*, 424 F.3d at 1042 n.7.

4 Under *McDonnell Douglas*, Plaintiff must first establish the prima facie case that (1) she  
 5 is a member of a protected class; (2) she was treated less favorably than an employee outside her  
 6 protected class in the terms and conditions of her employment; and (3) the employee outside her  
 7 protected class was similarly situated and doing substantially the same work. *McDonnell*  
 8 *Douglas*, 411 U.S. at 802. Establishing the prima facie case is a minimal burden, and does not  
 9 rise to the level of the preponderance of the evidence standard. *Dominguez-Curry*, 424 F.3d at  
 10 1037. Second, if Plaintiff is able to prove the prima facie case, the burden shifts to Defendant “to  
 11 articulate some legitimate, nondiscriminatory reason for the employee’s rejection.” *McDonnell*  
 12 *Douglas*, 411 U.S. at 802. Finally, should Defendant carry this burden, Plaintiff must then have  
 13 an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by  
 14 Defendant were not its true reasons, but were a “pretext” for discrimination. *Id.* at 804.

15 Alternatively, Plaintiff may show that even if not all stated legitimate reasons must fail,  
 16 that discrimination nevertheless “motivated” Defendant’s actions to some degree under the  
 17 mixed-motives framework. *Lahrichi v. Lumera Corp.*, 2006 WL 521659, at \*11 (W.D. Wash.  
 18 Mar. 2, 2006).

19       1. Prima Facie Case

20       *Member of a protected class:* It is undisputed that Plaintiff is a member of a protected  
 21 class as an African American woman. (Dkt. No. 1 at ¶ 1.1.)

22       *Less favorable treatment:* Plaintiff makes 4 different claims allegedly demonstrating less  
 23 favorable treatment. Plaintiff claims she was treated less favorably because of her race when

24           (1) “Mr. Wetmore singled her out, as the only African American female, to clean the  
 25 trash from in front of the Monroe Club”;  
 26           (2) she was given an admonishment in her personnel file and transferred to a different  
                 worksit, while Mr. Wetmore did not suffer either;

1                     (3) “the club impermissibly considered [Plaintiff’s] race and association with the  
 2                     NAACP when she interviewed for the Unit Director position in 2014” because the  
 3                     interviewers asked if she regretted her decision to file a complaint; and  
 4                     (4) “Mr. Rasmussen subjected her to heightened and unfair scrutiny about her work.”

4 (Dkt. No. 27 at 19–21.)

5                     Construing the evidence in the light most favorable to the non-moving party, Plaintiff has  
 6                     met her minimal burden with all of the allegations. (Dkt. No. 23 at 9, 122 (claim 1); Dkt. No.  
 7                     28-17 and Dkt. No. 23 at 125 (claim 2); Dkt. No. 28-10 at 17–18 (claim 3); Dkt. No. 28-28 at 19  
 8                     and Dkt. No. 28-38 at 2 (claim 4).) Plaintiff has established she received less favorable treatment  
 9                     on all 4 claims.

10                     *Similarly situated and non-protected:* In regards to Plaintiff’s first claim, Mr. Wetmore  
 11                     stated at his deposition that he did not know if Mr. Faidley was on duty that day when he came  
 12                     into the Club to ask Plaintiff to clean up the trash. (Dkt. No. 28-6 at 6.) He only knew after the  
 13                     fact that another, similarly situated and non-protected employee was on duty. (*Id.*) Plaintiff has  
 14                     provided only her belief that Mr. Faidley was working that day and he is Caucasian. (Dkt. No. 29  
 15                     at ¶ 4.) She has not provided any evidence to show that Mr. Wetmore knew Mr. Faidley was on  
 16                     duty. Therefore, Plaintiff has not demonstrated that Mr. Wetmore treated a similarly situated,  
 17                     non-protected employee differently than her when he asked her to clean up the trash in front of  
 18                     the BGC. The motion for summary judgment on this claim is GRANTED.

19                     Similarly, in regards to her second claim, Plaintiff cannot demonstrate that Mr. Wetmore  
 20                     was similarly situated and doing substantially the same work. Mr. Wetmore was the Unit  
 21                     Director and Plaintiff’s supervisor as a Program Director. Their roles at the Monroe BGC were  
 22                     very different and required them to do different work. The Court acknowledges that Mr.  
 23                     Wetmore was treated differently than Plaintiff after their 2013 incident, notably that Plaintiff was  
 24                     transferred while Mr. Wetmore was not and that Plaintiff received a notice of staff discipline  
 25                     while Mr. Wetmore did not. Yet, although it is uncontroverted that Mr. Wetmore’s behavior was  
 26                     inappropriate, Plaintiff cannot make out the prima facie case for this alleged less favorable

1 treatment because she and Mr. Wetmore were not similarly situated employees. The motion for  
 2 summary judgment on this claim is GRANTED.

3 Plaintiff has shown for her third race discrimination claim that a similarly situated non-  
 4 protected applicant, Mr. Rasmussen, was treated more favorably than Plaintiff was by getting the  
 5 2014 Unit Director job. (Dkt. No. 28-28 at 3.) Therefore, Plaintiff has met her prima facie case  
 6 burden for this claim.

7 Finally, Plaintiff has not provided any evidence for her fourth claim that Mr. Rasmussen  
 8 was less harsh on similarly situated non-protected employees. All Plaintiff has provided is her  
 9 belief that she was treated unfairly. She seems to allege that Mr. Rasmussen was implicitly  
 10 biased against her because she is African American. Although the Court acknowledges that  
 11 implicit biases can affect employee-employer interactions in a negative way, a belief that this is  
 12 happening is not enough to establish the prima facie case. Therefore, the motion for summary  
 13 judgment on this claim is GRANTED.

14 In sum, the motion for summary judgment is GRANTED as to discrimination claims 1, 2,  
 15 and 4. However, Plaintiff has provided enough evidence to prove the prima facie case of claim 3.  
 16 The Court, therefore, moves to the nondiscriminatory reason and pretext or motivating factor  
 17 analysis on this claim.

18           2. Legitimate Nondiscriminatory Reason

19 Defendant has provided evidence, in the form of Ms. Volmer's deposition, that Mr.  
 20 Rasmussen was hired for the 2014 position because of his financial experience. (Dkt. No. 28-7  
 21 at 19–20.) This is an adequate nondiscriminatory reason not to hire Plaintiff, who did not have  
 22 the same financial experience. Therefore, Defendant has met its burden.

23           3. Pretext and Motivating Factor

24 The Court now turns to Plaintiff's burden to produce sufficient evidence to raise a  
 25 genuine issue of material fact showing either that Defendant's stated legitimate reasons are  
 26 pretextual or that, even if not all stated legitimate reasons must fail, that discrimination

1 nevertheless “motivated” Defendant’s actions to some degree under the mixed-motives  
 2 framework. *Lahrichi*, 2006 WL 521659, at \*11. In proffering evidence on summary judgment  
 3 under either the pretext or the mixed-motives theory, an employee’s evidence may be either  
 4 direct or circumstantial. *Desert Palace Inc. v. Costa*, 539 U.S. 90, 101–02 (2003). Direct  
 5 evidence is that, which, “if believed, proves the fact [of discriminatory animus] without inference  
 6 or presumption.” *Dominguez-Curry*, 424 F.3d at 1038. “Circumstantial evidence is not only  
 7 sufficient, but may also be more certain, satisfying, and persuasive than direct evidence.” *Desert*  
 8 *Palace*, 539 U.S. at 100. Plaintiff may show pretext either (1) directly, “by showing that  
 9 unlawful discrimination more likely motivated the employer” or (2) indirectly, “by showing that  
 10 the employer’s proffered explanation is unworthy of credence because it is inconsistent or  
 11 otherwise not believable.” *Dominguez-Curry*, 424 F.3d at 1037. In sum, Plaintiff must raise a  
 12 genuine issue of material fact that would show that Defendant’s reasons were pretextual or, even  
 13 if some of Defendant’s reasons were legitimate, that discrimination also motivated the decision.

14 Plaintiff argues that pretext is established because the selection criteria for the Unit  
 15 Director position in 2014 included “subjective criteria about ‘financial things.’” (Dkt. No. 27  
 16 at 24.) However, there is no direct or circumstantial evidence that Defendant’s interest in hiring  
 17 someone with financial experience was a pretextual reason for not hiring Plaintiff. To the  
 18 contrary, there is evidence that Defendant recommended in Plaintiff’s performance reviews that  
 19 she learn more about finances. (Dkt. No. 28-5 at 3.)

20 However, it is undisputed that Plaintiff was asked about her NAACP complaint at her  
 21 interview. (Dkt. No. 28-12 at 20–21; Dkt. No. 28-7 at 21–24.) The actual questions asked and the  
 22 information sought from such questions is disputed, but a reasonable trier of fact could find that  
 23 asking about a complaint to a preeminent legal organization dedicated to advancing the civil  
 24 liberties of African Americans is circumstantial evidence that unlawful race discrimination  
 25 motivated Defendant in its decision not to hire Plaintiff in 2014. In an employment  
 26 discrimination dispute, a plaintiff generally needs to “produce very little evidence in order to

1 overcome an employer’s motion for summary judgment.” *Chuang v. Univ. of Cal. Davis, Bd. Of*  
 2 *Trustees*, 225 F.3d 1115, 1124 (9th Cir. 2000). This is because “the ultimate question is one that  
 3 can only be resolved through a searching inquiry—one that is most appropriately conducted by a  
 4 factfinder, upon a full record.” *Schnidrig v. Columbia Mach., Inc.*, 80 F.3d 1406, 1410 (9th Cir.  
 5 1996). The Ninth Circuit has “emphasized the importance of zealously guarding an employee’s  
 6 right to a full trial, since discrimination claims are frequently difficult to prove without a full  
 7 airing of the evidence and an opportunity to evaluate the credibility of the witnesses.” *McGinest*,  
 8 360 F.3d at 1112. Therefore, Plaintiff has demonstrated a genuine dispute of material fact and  
 9 Defendant’s motion for summary judgment on this claim is DENIED.

10           **D.     Retaliation Claims**

11           To establish retaliation under both § 1981 and WLAD, Plaintiff must prove (1) she  
 12 engaged in a protected activity; (2) she suffered an adverse employment action; and (3) there was  
 13 a causal connection between the protected activity and adverse employment action. *Ruggles v.*  
 14 *Cal. Polytechnic State Univ.*, 797 F.2d 782, 785 (9th Cir. 1986); *Lodis v. Corbis Holdings, Inc.*,  
 15 292 P.3d 779, 786 (Wash. Ct. App. 2013). Adverse employment actions are actions by an  
 16 employer that are “harmful to the point that they could well dissuade a reasonable worker from  
 17 making or supporting a charge of discrimination.” *Burlington N. & Santa Fe Ry. v. White*, 548  
 18 U.S. 53, 57 (2006). For example, an adverse employment action could be “the closing of the job  
 19 opening to [a plaintiff] and the loss of opportunity even to compete for the position.” *Ruggles*,  
 20 797 F.2d at 786.

21           If Plaintiff can establish the prima facie case, “the burden of production shifts to the  
 22 defendant to articulate some legitimate, nondiscriminatory reason for the adverse employment  
 23 decision. If the defendant is successful, the plaintiff must then prove by a preponderance of the  
 24 evidence that the proffered reasons are pretexts for retaliation or that a discriminatory reason  
 25 more likely motivated the employer’s action.” *Id.* (internal quotations omitted).

26           //

1           1. Prima Facie Case

2           *Protected activity:* It is undisputed that Plaintiff's claim to the NAACP was a protected  
 3 activity and the Court agrees.

4           *Adverse employment action:* Plaintiff claims she suffered 4 adverse employment actions:

5           (1) the issuance of a notice of discipline following the 2013 incident with Mr. Wetmore;  
 6           (2) her transfer after the 2013 incident with Mr. Wetmore;  
 7           (3) the refusal to consider her for the Unit Director position in 2014; and  
 8           (4) her "unwarranted" low performance review from Mr. Rasmussen in 2015.

9           (Dkt. No. 27 at 26.)

10          All of these could constitute an adverse employment action. First, negative performance  
 11 reviews, negative employment record notices, and transfers, even without a dock in pay, can be  
 12 adverse employment actions. *See Passantino v. Johnson & Johnson Consumer Prod., Inc.*, 212  
 13 F.3d 493, 506 (9th Cir. 2000) (discussing various Ninth Circuit cases). Further, a denial of a job  
 14 opportunity can also be an adverse employment action. *Ruggles*, 797 F.2d at 786. Therefore,  
 15 Plaintiff has demonstrated that she suffered adverse employment actions.

16          *Causal connection:* Plaintiff is unable to establish a causal connection for retaliation  
 17 claims 1 and 2. Both the issuance of her notice of discipline and her transfer due to the 2013  
 18 incident with Mr. Wetmore occurred *before* Defendant was notified that Plaintiff filed a  
 19 complaint with the NAACP. (*Compare* Dkt. No. 28-17 (dated May 21, 2013) *with* Dkt. No.  
 20 28-22 (dated May 29, 2013)); (*see also* Dkt. No. 28-7 at 12) (Ms. Volmer stating, "[w]e'd  
 21 already had her at Arlington" when Defendant got the complaint letter from the NAACP).  
 22 Therefore, there is no causal connection between her protected activity and the adverse  
 23 employment action. Plaintiff's first two retaliation claims are DISMISSED. The motion for  
 24 summary judgment on these claims is GRANTED.

25          In regards to Plaintiff's third retaliation claim, Defendant argues that Plaintiff's claim  
 26 fails because the questions about Plaintiff's NAACP complaint were asked 15 months after the

1 complaint was filed. (Dkt. No. 31 at 11–12.) While the timing between protected activity and  
 2 adverse employment action can be significant, Plaintiff has met her minimal burden to establish  
 3 the prima facie case on this claim because it is undisputed that questions about her NAACP  
 4 complaint were asked at her interview. The fact that it was still being asked about 15 months  
 5 later is what is suspect.

6 Finally, Plaintiff has provided evidence that Mr. Rasmussen knew about her complaint to  
 7 the NAACP when he completed her 2014 performance evaluation. (Dkt. No. 28-28 at 19.)  
 8 Therefore, she has met her minimal burden in proving that a reasonable trier of fact could find a  
 9 causal connection between her protected activity and low performance evaluation.

10 In sum, retaliation claims 1 and 2 are DISMISSED and Defendant’s motion for summary  
 11 judgment on these claims is GRANTED. However, Plaintiff has met the prima facie case burden  
 12 for her third and fourth retaliation claims. The Court will continue with the retaliation analysis as  
 13 to those two remaining claims.

14       2. Legitimate Nondiscriminatory Reason

15 Defendant states that Plaintiff was not hired for the 2014 position because she “was not  
 16 the strongest candidate by any objective measure.” (Dkt. No. 22 at 14.) Mr. Rasmussen had more  
 17 financial experience, which is what the Monroe Club was looking for at that time. (Dkt. No. 28-7  
 18 at 19–20.) This is a legitimate nondiscriminatory reason for Plaintiff’s third adverse employment  
 19 action.

20 As for her low performance evaluation, Mr. Rasmussen stated in the 2014 performance  
 21 review that she needed to improve her communication with him and work on being open to  
 22 criticism. (Dkt. No. 28-38 at 2.) Defendant has also provided emails that demonstrate that  
 23 Plaintiff was openly hostile to Mr. Rasmussen on multiple occasions. (Dkt. No. 23 at 119,  
 24 143–45.) These are legitimate nondiscriminatory reasons for her fourth adverse employment  
 25 action.

26       //

1                   3. Pretext and Motivating Factor

2                   Defendant argues that Plaintiff cannot establish pretext because Plaintiff was treated the  
 3 same as all the other applicants, she was encouraged to apply for the position, the hiring process  
 4 was fair and transparent, and Defendant “welcomed her continued employment.” (Dkt. No. 22  
 5 at 13–14.) However, a reasonable trier of fact could find that asking about Plaintiff’s protected  
 6 activity at the interview, and then denying Plaintiff the position after she said she did not regret  
 7 filing the complaint, is circumstantial evidence that Plaintiff was retaliated against for her  
 8 protected activity. Therefore, the motion for summary judgment on Plaintiff’s third retaliation  
 9 claim is DENIED.

10                  Defendant also argues that Plaintiff has failed to show any connection between Mr.  
 11 Rasmussen’s knowledge about her NAACP complaint and her performance review. (Dkt. No. 31  
 12 at 12.) Defendant essentially argues that Plaintiff’s evaluation from Mr. Rasmussen is consistent  
 13 with documentation that Plaintiff was insubordinate to and hostile towards Mr. Rasmussen prior  
 14 to the review. (*Compare* Dkt. No. 28-88 at 2 *with* Dkt. No. 23 at 119, 143–45.) Plaintiff counters  
 15 that Mr. Rasmussen’s higher level of scrutiny of her work was caused, at least in part, by his  
 16 knowledge of her NAACP complaint. (Dkt. No. 27 at 14–15.) By demonstrating Mr.  
 17 Rasmussen’s knowledge of her protected activity prior to giving her a poor performance  
 18 evaluation, Plaintiff has done enough to create a genuine dispute of fact that this was a  
 19 motivating factor for the alleged retaliation. *See Chuang*, 225 F.3d at 1124 (holding that  
 20 plaintiffs generally need to “produce very little evidence in order to overcome an employer’s  
 21 motion for summary judgment”). Therefore, the motion for summary judgment on Plaintiff’s  
 22 fourth retaliation claim is DENIED.

23                  In sum, Plaintiff’s first and second retaliation claims are DISMISSED and Defendant’s  
 24 motion for summary judgment on these claims is GRANTED. However, Defendant’s motion for  
 25 summary judgment on Plaintiff’s third and fourth retaliation claims is DENIED.

26                  //

1       **III. MOTION TO SEAL**

2           The parties filed a stipulated motion to seal documents attached to Defendant's separate  
3 motion for an independent medical exam (Dkt. No. 33). The Court starts from the position that  
4 "[t]here is a strong presumption of public access to [its] files." W.D. Wash. Local Civ. R.  
5 5(g)(3); *see also Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978). However, a  
6 particularized showing of good cause will suffice to warrant sealing discovery documents  
7 attached to non-dispositive motions. *Kamakana v. City and Cnty. of Honolulu*, 447 F.3d 1172,  
8 1180 (9th Cir. 2006). The documents filed under seal contain private medical and personal  
9 information about Plaintiff. The Court concludes that the parties have made a particularized  
10 showing of good cause. Therefore, the motion to seal (Dkt. No. 33) is GRANTED.

11       **IV. CONCLUSION**

12           For the foregoing reasons, Defendant's motion for summary judgment (Dkt. No. 22) is  
13 GRANTED in part and DENIED in part and the parties' stipulated motion to seal (Dkt. No. 33)  
14 is GRANTED. Ultimately, the claims that remain are Plaintiff's discrimination and retaliation  
15 claims in regards to the 2013 and 2014 Unit Director positions and her retaliation claim in  
16 regards to Mr. Rasmussen's supervision and performance evaluation.

17           DATED this 7th day of March 2017.

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John C. Coughenour  
UNITED STATES DISTRICT JUDGE